IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0629

BARRY ALONZO HEATH,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade, The Honorable Thomas M. McKittrick, Presiding

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1. Did the district court err in denying Appellant's petition for postconviction relief?

2. Did Appellant's counsel for postconviction relief provide ineffective assistance of counsel?

STATEMENT OF THE CASE

A jury convicted Barry Alonzo Heath (Heath) of Sexual Intercourse Without Consent and Tampering with a Witness on March 11, 2002. This Court affirmed Heath's convictions, but reversed for sentencing in *State v. Heath*, 2004 MT 58, 320 Mont. 211, 89 P.3d 947 (*Heath I*). The district court resentenced Heath and he appealed his new sentence. This Court denied his appeal in *State v. Heath*, 2005 MT 280, 329 Mont 226, 123 P.3d 228 (*Heath II*).

Heath timely filed a petition for postconviction relief with the district court on February 7, 2007. (D.C. Doc. 1.) Heath alleged ineffective assistance of counsel. (D.C. Doc. 1.)

On February 8, 2008, the district court granted Heath's petition to the limited extent that it eliminated his restitution obligation. The district court denied the remainder of Heath's petition and denied his request for an evidentiary hearing. (D.C. Doc. 12.) Heath appealed. (D.C. Doc. 13.) This Court reversed and

remanded for an evidentiary hearing. (D.C. Doc. 16.2, *Heath v. State*, 2009 MT 7, ¶ 28, 348 Mont. 361, 202 P.3d 118 (*Heath III*).)

An evidentiary hearing was held on April 16, 2009. (D.C. Doc. 24.) Post hearing briefing was filed. (D.C. Docs. 25, 28-30.) The district court denied Heath's petition for postconviction relief. (D.C. Doc. 31.)

Heath timely filed a notice of appeal. (D.C. Doc. 35.)

STATEMENT OF THE FACTS

A jury convicted Heath of Sexual Intercourse Without Consent and Tampering with a Witness on March 11, 2002. *Heath III*, ¶ 4. This Court affirmed Heath's convictions, but reversed for sentencing. *Heath III*, ¶ 5. The district court resentenced Heath and Heath appealed his new sentence. This Court denied his appeal. *Heath III*, ¶ 5.

Heath timely filed a petition for postconviction relief with the district court on February 7, 2007. (D.C. Doc. 1.) Heath's initial PCR counsel, David Avery (Avery), alleged several instances of ineffective assistance of trial counsel Steven Hudspeth (Hudspeth), including: failure to properly impeach the victim, failure to call several witnesses including Dr. Harper who performed the emergency room examination of the victim, and failure to reenact the alleged struggle as was promised to Heath. (D.C. Doc. 1 at 3-6.) Further, Hudspeth failed to object to the imposition of restitution for a crime that was dismissed. (D.C. Doc. 1 at 7.)

Avery spoke with Hudspeth and requested that he answer Heath's allegations through an affidavit. Hudspeth declined. (D.C. Doc. 1 at 7.)

On February 15, 2007, the State moved the district court for a *Gillham Order* directing Hudspeth to respond to the charges in Heath's petition. (D.C. Doc. 3.) The district court granted the motion and ordered Hudspeth to respond. (D.C. Doc. 4.) Hudspeth took his own life without having filed the affidavit ordered by the district court. (D.C. Doc. 8 at 6; *see also*, *Heath III*, ¶ 8.)

On March 12, 2007, Heath filed a motion for hearing and guidance from the district court. (D.C. Doc. 5.) The motion went unanswered. *Heath III*, ¶¶ 9, 11. The State responded to Heath's petition for PCR on May 3, 2007.

In the beginning of June 2007, Avery removed himself voluntarily from the case and Colin Stephens (Stephens) appeared as Heath's counsel. (D.C. Docs. 9-10.) Stephens replied to the State's response and included new issues/allegations of Hudspeth's ineffective assistance of counsel: failure to investigate the physical evidence. (D.C. Doc. 11 at 4-5.) Heath's reply renewed his request for a hearing. (D.C. Doc. 11.)

The district court partially granted Heath's petition by eliminating his restitution obligation. The district court denied the remainder of Heath's petition and denied his request for an evidentiary hearing. (D.C. Doc. 12.) Heath appealed. This Court reversed and remanded for an evidentiary hearing based on

the unique circumstances the case presented. (D.C. Doc. 16.2, *Heath III*, ¶¶ 27, 28.) This Court stated the district court abused its discretion when it denied Heath's petition without holding an evidentiary hearing and without considering all of Heath's claims. *Heath III*, ¶ 27.

An evidentiary hearing was held on April 16, 2009. (D.C. Doc. 24.) At the hearing Avery testified as to his conversations with Hudspeth concerning his representation of Heath during the trial. (4/16/10 Tr. at 6-19.) Heath provided testimony as well. (4/16/10 Tr. at 32-66, 88.) Kory Larsen testified as to his past experience with Hudspeth as his adversary. (4/16/10 Tr. at 90-92.) Post hearing briefs were filed by Heath and the State. (D.C. Docs. 25, 28-30.)

On October 2, 2009, the district court denied Heath's petition for postconviction relief. (D.C. Doc. 31.) Heath timely filed a notice of appeal. (D.C. Doc. 35.)

Additional facts will be provided below where relevant.

SUMMARY OF THE ARGUMENT

Heath was denied effective assistance of counsel by Hudspeth. The district court's findings of fact were clearly erroneous and its conclusions of law incorrect. Hudspeth's failure to perform a reenactment, call witnesses on Heath's behalf, and investigate the evidence was deficient performance which resulted in Heath's conviction. There is no way to tell what was in Hudspeth's mind or his reasons for

his actions (or inactions) in Heath's case as prior to Hudspeth's suicide he destroyed his case files. The just remedy is to reverse the district court's order denying Heath postconviction relief and grant him a new trial.

If this Court finds Hudspeth provided effective counsel, Heath was denied effective assistance from his PCR counsel, Avery and Stephens, who failed to call witnesses, obtain affidavits, and provide evidence to support Heath's case. This Court should reverse the district court's order denying postconviction relief, assign new counsel, and order a new evidentiary hearing.

STANDARD OF REVIEW

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Hamilton v. State*, 2010 MT 25, ¶ 7, 355 Mont. 133, ___ P.3d ___. Ineffective assistance of counsel claims present mixed questions of fact and law that this Court reviews de novo. *Robinson v. State*, 2010 MT 51, ¶ 10, 355 Mont. 326, ___ P.3d ___ (*citing Hirt v. State*, 2009 MT 116, ¶ 24, 350 Mont. 162, 206 P.3d 908).

A reviewing court's scrutiny of counsel's performance must be "highly deferential," and the court must indulge a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" contemplated by the Sixth Amendment. *See Strickland v. Washington*, 466 U.S.

668, 689 (1984). *See also*, *Whitlow v. State*, 2008 MT 140, ¶ 15, 343 Mont 90, 183 P.3d 861. As a consequence, "a petitioner seeking to reverse a district court's denial of a petition for postconviction relief based on a claim of ineffective assistance of counsel bears a 'heavy burden.'" *Whitlow*, ¶ 21.

ARGUMENT

Postconviction relief is a civil statutory remedy created by the Legislature. Mont. Code Ann. § 46-21-101 through -203. A petition requesting postconviction relief must show, by a preponderance of the evidence, that the facts justify the relief. *Hamilton*, ¶ 10 (*citing Heath III*, ¶ 16.) A petition for postconviction relief must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." *Hamilton*, ¶ 10 (*citing* Mont. Code Ann. § 46-21-104(1)(c)). "Mere conclusory allegations are insufficient to support the petition." *Hamilton*, ¶ 10 (*citing Beach v. State*, 2009 MT 398, ¶ 16, 353 Mont. 411, 220 P.3d 667).

This Court applies the two-prong test from *Strickland* in assessing claims of inadequate assistance of counsel. The defendant must show counsel's performance was deficient and that the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Hamilton*, ¶ 12. *See also*, *Dawson v. State*, 2000 MT 219, ¶ 20, 301 Mont. 135, 10 P.3d 49; *State v. Hendricks*, 2003 MT 223,¶ 6, 317 Mont. 177, 75 P.3d 1268. With respect to the first prong, the question

that "must be answered is whether counsel's conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Hamilton*, ¶ 12 (*citing Whitlow*, ¶ 20).

This Court has stated that "[t]he strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and was based on sound trial strategy still remains." *Hamilton*, ¶ 12 (*citing Whitlow*, ¶ 21). *See also Strickland*, 466 U.S. at 689. This presumption "likewise undergirds the long-standing appellate standard that a petitioner seeking to reverse a district court's denial of a petition for post-conviction relief based on a claim of ineffective assistance of counsel bears 'a heavy burden.'" *Whitlow*, ¶ 21 (*quoting Brown v. State*, 277 Mont. 430, 434, 922 P.2d 1146, 1148 (1996)). Under the second prong, the defendant bears the burden of establishing prejudice by demonstrating that, but for counsel's errors, there is a reasonable probability that the result would have been different. *Hamilton*, ¶ 12 (*citing State v. Godfrey*, 2009 MT 60, ¶ 14, 349 Mont. 335, 203 P.3d 834). *See also*, *Stevens v. State*, 2007 MT 137, ¶ 14, 337 Mont. 400, 162 P.3d 82.

The court may not second-guess tactical decision of counsel, as long as those decisions are objectively reasonable. *Whitlow*, ¶¶ 18-19. The fact that some other lawyer would have done differently is not enough to establish ineffective assistance of counsel. *State v. Grixti*, 2005 MT 296, ¶ 28, 329 Mont. 330, 124 P.3d

177. A reviewing court's scrutiny of counsel's performance must be "highly deferential," and the court must indulge a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" contemplated by the Sixth Amendment. *See Strickland*, 466 U.S. at 689. *See also*, *Whitlow*, ¶ 15. As a consequence, "a petitioner seeking to reverse a district court's denial of a petition for postconviction relief based on a claim of ineffective assistance of counsel bears a 'heavy burden.'" *Whitlow*, ¶ 21.

A finding that an attorney could have done a "better" or "more thorough" job and that a defendant may have suffered some prejudice as a result is not the equivalent of ineffective assistance of counsel, pursuant to *Strickland*. *State v. Hagan*, 2002 MT 190, ¶ 23, 311 Mont. 117, 53 P.3d 885. Finally, this Court has observed that postconviction proceedings are not a fishing expedition or discovery device in which a petitioner, through broad allegations in a verified petition, may establish the right to an evidentiary hearing. *Robinson*, ¶ 19 (*citing Smith v. State*, 2000 MT 327, ¶ 28, 303 Mont. 47, 15 P.3d 395).

I. THE DISTRICT COURT ERRED IN DENYING POSTCONVICTION RELIEF TO HEATH.

The district court denied Heath's petition for postconviction relief in a 51-page order. (D.C. Doc. 31.) The district court found that Heath had raised eleven issues by way of his original petition, reply brief, at the evidentiary hearing, and in post-evidentiary hearing briefing.

In Finding of Fact No. 1, the district court stated Hudspeth's 2002 letter to the ODC was more credible than Heath's testimony. That the failure to go over any trial prep was not believable, as Hudspeth stated in his letter to the ODC, Heath "did the opposite of everything we went over for purposes of testimony, and the jury did not believe him." (D.C. Docs. 23, Ex. C and 31 at 4.) At the evidentiary hearing Heath testified that Hudspeth never went over anything in preparation for trial. The State's post hearing brief supports the credibility of this assertion by referring to Heath's testimony: "during the hearing, Heath proved himself a poor source of authority on trial strategy. His testimony at the hearing showed his lack of self-awareness. He stated at one point he would have been willing to open the door to a full attack on his character." (D.C. Doc. 28 at 6-7.) This precisely proves and bears credibility to Heath's assertion that Hudspeth never went over any trial strategy with him or educated Heath as to law of evidence and admissibility. Contrary to Hudspeth's letter to the ODC, Hudspeth's actions (or lack thereof) support Heath's testimony and credibility.

Finding of Fact No. 16, found Heath was not particularly well-equipped to assist in his own defense. (D.C. Doc. 31 at 15-16.) The court stated Hudspeth did communicate regularly with Heath in preparation for trial. Hudspeth may have refused to take Heath's calls, because Heath called several times a day and asked the same questions. (D.C. Doc. 31 at 15-16.) Again, Hudspeth's actions of failing

to prepare Heath for trial was evident in the testimony provided by Heath at the evidentiary hearing regarding his lack of understanding of the law and procedures. Further, Hudspeth's failure to prepare for trial himself by not investigating the evidence, calling witnesses on Heath's behalf (including Dr. Harper as discussed below), and not performing a reenactment of the struggle, all support a finding that Hudspeth was "not particularly well-equipped" to handle Heath's case nor communicate properly with Heath.

In Finding of Fact No. 17, the district court stated Heath failed to present an affidavit, record or other evidence that adequately supported his claim that the scene in the house would have appeared dramatically different than it did in the police photographs had there been a struggle for an hour or more. (D.C. Doc. 31 at 16.) The court stated that the photographs in the exhibit attached to Heath's petition did not depict an orderly space, and that a jury could find ample evidence of a one-hour struggle from the pictures. (D.C. Doc. 31 at 17.) Heath presented evidence that the scene in the house should have been different if an hour long struggle occurred as Dansereau alleged: the pictures. If a struggle was to have occurred for over an hour in the small confined space of the kitchen, then items would have been knocked off the countertops or the top of the refrigerator, as Heath was alleged to have shoved her into it. (D.C. Doc. 31 at 20.) The photos show exactly the opposite. Although the kitchen was not a well-kept area, no

items were seemingly tossed about from a confrontation that lasted over an hour in the small confined space. Nothing was knocked off the counter. Even items placed on the kitchen floor were not overturned or scattered as one would expect to occur in a struggle for that amount of time and that amount of space. The dog food and water bowl were not spilled, nor were the item-filled boxes. (D.C. Doc. 1 at Ex. F, photos of kitchen.) A reenactment of the struggle would have proven that Dansereau's version of the struggle could not have taken place.

Finding of Fact No. 19 discussed Avery's conversations with Hudspeth about his representation of Heath. Avery said that Mr. Hudspeth would not speak with him, would not answer his questions, except by offering a brief reply regarding why he did not perform a reenactment, but otherwise told Mr. Avery to get a *Gillham* order, before he would talk about the case with him. (D.C. Doc. 31 at 17.) Although the district court called Hudspeth's request for an order "professionally prudent" (D.C. Doc. 31 at 27), the sequence of the events at that time is interesting to note.

- Heath's PCR counsel, Avery, contacted Hudspeth in December 2006 and questioned him about his representation of Heath. (4/16/09 Tr. at 8.) Hudspeth declined to respond and stated "get an order." (4/16/09 Tr. at 12.) Avery said to Hudspeth, "You know, Steve, sometimes we all make mistakes, and you've got to just feel free to talk freely. This was your client." Hudspeth responded, "Get an order. I don't want to talk about it." (4/16/09 Tr. at 12-13.)

- Heath filed a postconviction relief petition February 7, 2007, alleging ineffective assistance of counsel Hudspeth and requesting a hearing so Hudspeth could answer to the allegations. (D.C. Doc. 1.)

- Approximately in the beginning of February 2007, Hudspeth "cleaned house" and threw 10-15 boxes in the dumpster, ultimately destroying some client files. Heath's case file was not found or located. (D.C. Doc. 16; 4/16/09 Tr. at 96-97.)

- The State motioned the district court for a *Gillham* order so that Hudspeth may respond to Heath's allegations. (D.C. Doc. 3.)

- The district court granted the order. (D.C. Doc. 4.)

- Hudspeth did not respond to the district court order. (D.C. Docs. 11 at 6: *Heath III*, 8)

- Hudspeth committed suicide February 16, 2007. (D.C. Doc. 8 at 6.)

Avery's conversation with Hudspeth in December 2006 showed Hudspeth's state of mind at that time and for Heath's case: "It's easy for you appellate guys to clean up this kind of mess afterwards. You don't know what it's like down in the trenches." (4/16/09 Tr. at 18.) Hudspeth seemed to imply he had screwed-up Heath's case himself, as the statement "clean up this kind of mess afterwards" implies. Hudspeth's "professionally prudent" behavior (as labeled by the district court) led him to destroy client files. (D.C. Doc. 16 at 2; 4/16/09 Tr. at 96-97.) Hudspeth never filed a response to the court's order. Hudspeth was so unable to function that he chose to end his life. If Hudspeth had not been ineffective in Heath's case, then why destroy files, including Heath's, prior to his suicide?

Finding of Fact No. 19 and Conclusion of Law No. 7 discussed Hudspeth's failure to call Dr. Harper. The district court found "Dr. Harper's report did not reflect that he did not find evidence of non-consensual sex. Dr. Harper's report merely reports the incident and the results of the physical examination, and gives his impression: "ACUTE ALLEGED SEXUAL ASSAULT." Contrary to the court's finding, "acute alleged sexual assault" supports a conclusion that sexual assault did not occur from the use of the word "alleged."[1] Here it was used by the examination doctor to show that he did not find any sexual assault had occurred. Dr. Harper should have been called to testify, or even interviewed by Hudspeth to determine the meaning of "alleged" in the report. Neither was done. Further, the district court's quote of Dr. Harper's report on the pelvic examination shows no rape occurred. (*See* D.C. Doc. 31 at 18.)

Finding of Fact 24 and Conclusion of Law No. 9, found that it was reasonable for Hudspeth to not prepare for a reenactment that would be detrimental to his client. However, a reenactment would have shown how the kitchen would have been more "destroyed" from a prolonged struggle. Items on the counter and refrigerator would have been toppled and scattered throughout the kitchen. The

[1] Alleged: adjective. 1. Asserted to be true or to exist <*an alleged miracle*> 2. Questionably true or of a specified kind: supposed, so-called <*bought an alleged antique vase*> 3. Accused but not proven or convicted <*an alleged burglar*>. Webster Online Dictionary (www.merriam-webster.com), last visited April 12, 2010.

pictures show an unkempt kitchen but a reenactment would have proven that items from the counter and refrigerator would have been scattered on the floor. As Conclusion of Law No. 4 stated, "The fight was very physical and involved shoving, cussing and [ ] Dansereau hitting the refrigerator." (D.C. Doc. 41 at 36.) At the very least, video of the kitchen's small size would have shown that a struggle in it would have produced more of a mess.

The district court discussed Hudspeth's conflict of interest in representing Heath. (D.C. Doc. 31 at 28-29.) In Finding of Fact 25, the court describes the contents of the August 28, 2002 letter to the Office of Disciplinary Counsel (ODC), wherein he states Heath knew about Hudspeth's prior representation of the victim's brother several years prior. (D.C. Docs. 23 at Ex. B, 31 at 28.) If Hudspeth's letter to the ODC was so credible in the court's eye, why didn't Hudspeth get a signed waiver from Heath which then could have been submitted in his response to the ODC complaint? A signed waiver would have been the "professionally prudent" course of action.

Contrary to the court's finding that Hudspeth's letter was credible, Heath testified that he did not know about the prior representation until after he was convicted. Although the district court finds Heath lacked credibility in this regard, it is interesting the district court also failed to acknowledge Heath's witness on this issue: Fr. Nyquist. (4/16/09 Tr. at 4-6.) Fr. Nyquist testified at the evidentiary

hearing that he had met Heath while performing prison ministry. Fr. Nyquist took out a personal bank loan in order to obtain counsel for Heath. Fr. Nyquist testified that had he known, or learned, of Hudspeth's former representation of the victim's brother, he never would have secured Hudspeth to represent Heath. (4/16/09 Tr. at 5-6.) In its conclusions of law, the district court stated, Heath did not show how the outcome of the trial would have been different. (D.C. Doc. 31 at 46.) However, Hudspeth's prior representation and failure to inform Heath goes to his lack of reasonable defense in this case. Further, Fr. Nyquist's testimony proves that a different outcome at trial would have occurred: a different attorney would have been retained.

The district court referred to Kory Larsen's testimony at the evidentiary hearing. (D.C. Doc. 31 at 30.) Larsen testified he prosecuted approximately 30 cases with Hudspeth as defense attorney; Hudspeth was one of the best trial attorneys he practiced against; that it was not unusual for Hudspeth to forego calling witnesses that were on the witness list; Hudspeth knew of 404(b) character evidence and would share strategy of why called or not; that Hudspeth had used video evidence in a DUI case, and had used reenactment as a defense tactic. (D.C. Doc. 31 at 30.) The district court failed to acknowledge Larsen's other testimony: that he and Hudspeth were good friends, and that their wives were good friends as well. (4/16/09 Tr. at 90.) Absent from Larsen's testimony is whether he knew if

Hudspeth's character had changed prior to his suicide. If he, or their wives, were such good friends, then it would have been possible to know his friend was in trouble. And if this was not the case, then isn't it possible that Larsen's conclusions about Hudspeth's professional abilities were inaccurate?

Regarding the assertion that Hudspeth failed to investigate the evidence, the district court concluded that any failure of Hudspeth to inspect the evidence was harmless error and that the second prong of *Strickland* was not met. (D.C. Doc. 31 at 49.) The issue of failure to inspect was first raised in Heath's reply to the State's response (June 18, 2007) and at the evidentiary hearing. (D.C. Doc. 31 at 30.) The court stated this issue was not raised in the original petition and that no amendment to the petition was filed. However, Heath filed a Motion for Guidance from the court (filed by prior PCR counsel Avery and based on Hudspeth's suicide and failure to answer Heath's assertions of IAC) and stated in the motion he would wait for instructions from the court to file such a pleading. The district court never responded to Heath's Motion for Guidance. Even though the district court concluded the claim was procedurally barred because it was not properly raised in an amended petition according to Mont. Code Ann. § 46-21-105, it decided to analyze the issue:

> Nevertheless, to avert any doubt regarding the possibility that Mr. Avery preserved the right to amend until the Court issued guidance on the matter, the Court concludes that, even if Hudspeth did fail to

> inspect the evidence, the error was harmless, and the second prong of the Strickland test is not met.

(D.C. Doc. 31 at 49.) In its analysis, the district court stated that the record was clear that the basis of Hudspeth's objection to the hair was for lack of foundation. And that since Heath did not have an objection to the admission of the gag rag, the hair would have been admissible as well. Admission of the gag rag is not the issue, the failure of Hudspeth to inspect the physical evidence prior to its admission at trial is the issue. In briefing this issue for the district court, the State on one hand conceded the evidence at issue clearly supported the victim's statement that a forcible rape occurred and helped refute Heath's claim that the case was a "he said, she said case." On the other hand, the State suggested that Hudspeth's failure to investigate the evidence was harmless error. (D.C. Doc. 28 at 5, 9, State's Post Evidentiary Hearing Brief on PCR.) The district court obviously bought the harmless error argument parlayed by the State. However, Heath asks: how a piece of evidence can be so helpful to the State's case ***and*** harmless at the same time? Implicit from the trial record is the fact that Hudspeth did not think the piece of evidence was harmless--unless it was one of Hudspeth's "effective strategies" to object to harmless evidence. (D.C. Doc. 28 at 4, referring to the sitting judge's professional experience with Hudspeth.) Hudspeth clearly believed the evidence prejudiced Heath and that is why he objected so strenuously to its admission and use at trial. Had Hudspeth exercised reasonably competent

professional conduct by investigating the evidence, he could have been prepared for the evidence's possible admission. He could have prepared a motion in limine for its exclusion, potentially conduct testing to determine to whom the hair belonged, or countered the evidence in any number of other ways. This issue alone demonstrates Heath received ineffective assistance of counsel which prejudiced him. (D.C. Doc. 29, heath's reply to State's response post hearing brief.)

As argued above, Hudspeth committed several errors of ineffective assistance of counsel. These actions (or lack thereof) are cumulative in nature and denied Heath effective assistance of counsel, ultimately denying him the right to a fair trial. The doctrine of cumulative error requires reversal of a conviction where a number of errors, taken together, prejudiced a defendant's right to a fair trial. *State v. Ferguson*, 2005 MT 343, ¶ 124, 330 Mont. 103, 126 P.3d 463. The existence of prejudice must be established by the defendant, as mere allegations of error without proof of prejudice is inadequate to satisfy the doctrine. Heath has provided the proof of prejudice: a reenactment of the struggle would have shown that it did not occur as alleged by Dansereau; failure to call witnesses on Heath's behalf including Dr. Harper, who examined Dansereau after the alleged crime, and would have testified as to his conclusions of "acute ***alleged*** sexual assault." Hudspeth did not contact Heath's father at least to inquire about Dansereau's statement of wanting Heath put in prison. Hudspeth failed to notify Heath of a

conflict of interest: Heath would have obtained other counsel. Hudspeth failed to investigate the evidence (the hair in the cloth). Although, Hudspeth may have performed reasonably in prior trials according to Kory Larsen (a former friend and professional adversary and someone from whom Hudspeth rented office space from), no one wants to speak ill of the dead. (4/16/09 Tr. at 88.) Larsen did not testify to Hudspeth's specific actions in Heath's case, he couldn't. Hudspeth's errors prejudiced Heath and ultimately led to his conviction.

Although the district court found that Hudspeth's 2002 letters to the ODC were more credible than Heath's "self-serving" testimony, this attorney begs to differ. Hudspeth's files on Heath's case were destroyed by Hudspeth prior to his suicide therefore Hudspeth's reasoning for his actions cannot be determined. *Heath III*, ¶ 27. Hudspeth's 2002 letters to the ODC may be considered "self-serving," since no attorney wants to be brought before the Office of Disciplinary Counsel.

The district court's findings of fact were clearly erroneous as they disregarded evidence presented to it and took for granted the prior written letters of a deceased/disgraced attorney who committed suicide because he couldn't cope with life. The cumulative effect of Hudspeth's errors denied Heath effective assistance of counsel, which in turn, denied him a fair trial. This Court should reverse and remand this case for a new trial.

II. HEATH'S PCR ATTORNEY WAS INEFFECTIVE AS HE DID NOT FILE AFFIDAVITS, NOR CALL WITNESSES TO TESTIFY AT THE EVIDENTIARY HEARING, AND HE DID NOT FOLLOW PCR PROCEDURE AND PROPERLY AMEND THE ORGINAL PETITION.

A petitioner in postconviction relief proceedings has the burden to "show by a preponderance of evidence that the facts justify relief." *State v. Peck*, 263 Mont. 1, 3, 865 P.2d 304, 305 (1993). When seeking postconviction relief, a defendant must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." Mont. Code Ann. § 46-21-104(1)(c); *State v. Wright*, 2001 MT 282, ¶ 31, 307 Mont. 349, 42 P.3d 753. Mere conclusory allegations are not enough to support the petition. A defendant's affidavit, unsupported by evidence, is also insufficient to support a petition for postconviction relief. *Williams v. State*, 2002 MT 189, ¶ 19, 311 Mont. 108, 53 P.3d 864.

After reversal by this Court for an evidentiary hearing (in *Heath III*) it was incumbent upon Heath and his postconviction relief counsel to bring to the district court sufficient evidence that showed by a preponderance that relief was justified. Here, counsel Avery, and then counsel Stephens, were ineffective in several ways:

- Failure to use affidavits from, or call as witnesses for the evidentiary hearing: Lori Heath, Rhonda Oshio, Gretchen Dansereau, Mike Manning, Dr. Harper, Heath's father.

- Failure to procure phone records from the county jail where Heath was located prior to trial to disprove Hudspeth's letter to the ODC that Heath called several times a day and the conversations were "inane and fruitless." (D.C. Doc. 23 at Ex. C.)

- Failure to properly amend the original PCR petition in order to properly raise the issues of Failure of Hudspeth to investigate the evidence and Hudspeth's failure to contact and call as a witness Heath's Father as required by Mont. Code Ann. § 46-21-105. (D.C. Doc. 31.)

Heath's PCR counsel only relied on Heath's affidavit as support for his relief. This was not enough, as "mere conclusory allegations are not enough to support [a] petition" for post conviction relief. "A defendant's affidavit, unsupported by evidence, is also insufficient to support a petition for post-conviction relief." *Williams*, ¶ 19. Heath's counsel for PCR was ineffective as he failed to provide evidence to support his petition for postconviction relief. Affidavits from potential witnesses would have supported Heath's claims for PCR and would have bolstered his credibility. Affidavits were necessary after counsel learned Hudspeth's client files were destroyed. It is likely the district court would have provided relief if affidavits from the witnesses above were included in the original (or an amended) petition.

Further, failure to properly amend the original petition was deficient and not objectively reasonable. PCR law is codified in Montana, and provides the proper steps, processes, and procedures to take. Mont. Code Ann. § 46-21-100 et. seq.

CONCLUSION

The district court's order denying Heath's petition for postconviction relief should be reversed and he should be granted a new trial.

In the alternative, counsel for Heath's PCR petition was ineffective and this Court should reverse the district court order and grant Heath new counsel for a new evidentiary hearing so that affidavits and evidence may be properly submitted.

Respectfully submitted this ____ day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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LISA S. KORCHINSKI

APPENDIX